

Decision No. _____

ORIGINAL

Decision No. 4172

BEFORE THE RAILROAD COMMISSION OF THE
STATE OF CALIFORNIA

CHARLES KAPPLER,
Complainant,

-vs-

ETNA DEVELOPMENT CO.,
Defendant.

Case No. 965

B. K. Collier
Horace T. Jones For Complainant.
Benjamin Davidson

Taylor & Tebbe For Defendant.

C.J. Luttrell, of
Luttrell & Ley, For Interveners.

John A. Wagner, William Wagner,
Frank Wagner; A. E. Hughes, Fred
G. Smith, Anna Jenner, as Admin-
istratrix of the Estate of Cord
Sackman, deceased, and Anna Jenner
in behalf of herself, and as Trus-
tee of Charles E. Jenner, Anita
Jenner and George K. Jenner.

BY THE COMMISSION.

OPINION

The complaint in this case alleges, among other matters, that complainant has been since 1909, and now is, the owner of certain agricultural lands situated about one mile west of the Town of Etna, Siskiyou County, and that the defendant, a California corporation, is, and has

been for a number of years past, engaged in furnishing the inhabitants of the Town of Etna and the vicinity with water for domestic and irrigation purposes; that a portion of complainant's lands, situated on the line and within the flow of defendant's ditch, and comprising about thirty acres, is agricultural and planted to fruit trees, vines, alfalfa and other products requiring irrigation.

The complainant further alleges that from 1909 to 1914, inclusive, defendant has furnished water from its said ditch to plaintiff for the irrigation of said land, but that during the years 1915 and 1916, defendant refused to deliver to complainant any water whatsoever for the irrigation of said lands, although complainant repeatedly demanded such service and was at all times willing to pay a reasonable amount for the same.

The defendant in its answer, in addition to denying a number of the allegations of the complaint, alleges that it has allowed complainant to have such of its surplus water as it could spare for the purpose of irrigating his agricultural land, upon the distinct understanding that complainant could have merely the surplus water of the defendant, because the needs of the Town of Etna and its inhabitants for fire protection, domestic use, and for irrigating lawns and gardens required practically all of the water. Defendant also alleges that it offered complainant such surplus water for the price of \$120.00 per year, to be paid in advance, and that complainant has refused to take such water under this condition.

The answer further alleges that defendant's water system consists of a ditch which taps Etna Creek several miles from the town, conducting the water to a point about three-quarters of a mile from Etna, where, by means of a penstock, the water is discharged into a pipe line through which said water is distributed in said town; and that for use in case of fire defendant is obliged to provide for considerable increase in the amount of water taken into said pipe line, and in order so to provide, defendant carries sufficient water in the ditch to fill said pipe for ordinary use and to have an overflow at the point where the ditch water is taken into said pipe so that automatically a draft of water is supplied for use in case of fire without any delay, as the overflow is taken to fill the pipe; that to supply complainant with irrigation water, such water must be taken from defendant's ditch at a higher elevation and about three-quarters of a mile above said penstock; that should defendant be obliged to furnish complainant water for the irrigation of his said thirty acres of agricultural land, defendant would not have the proper amount of water as overflow at its penstock, especially during the months of July, August, September and October; that should defendant be required to furnish water at all times sufficient to irrigate said thirty acres of land, the Town of Etna would be deprived of water when necessary for use in case of fire, and in this regard the answer alleges that it would take at least two hours' time to obtain sufficient water

in case of fire, for the reason that defendant would be obliged to send a man up the ditch, which runs along a steep hillside to the diverting point of such water, to close the gate, after which it would take an hour for such water, restored to defendant's ditch, to reach the Town of Etna.

Public hearings were held in Etna on October 6th, 1916, and in Yreka on February 1st and 2nd, 1917, before Examiner Bancroft.

At the Etna hearing it developed that there were certain users of water who might have claims adverse to those of both the complainant and the defendant, and, accordingly, on January 16th, 1917, and prior to the second hearing, the Commission duly made an order addressed to G. A. Richman or G. A. Reichman, of Fort Jones, Siskiyou County, and to Fred G. Smith, John Wagner, Frank Wagner, William Wagner, Ed. Hughes, Thomas P. Dowling, A. E. Hughes, Anna Jenner, Administratrix of the Estate of Charles Jenner, deceased, and Anna Jenner, Administratrix of the Estate of Cord Sackman, deceased, of Etna, Siskiyou County, directing all of said persons to appear before the Railroad Commission on February 1st, at Yreka, to show cause why the Commission should not accord to the complainant the relief prayed for in the complaint in the above entitled action.

Copies of this order to show cause, together with copies of the complaint, were duly served by mail upon all of the persons above named, and the following appeared or were represented by their attorney at the second hearing: John A. Wagner, William Wagner, Frank Wagner, Fred G. Smith,

A. E. Hughes, G. A. Reichman, Anna Jenner, as Administratrix of the Estate of Cord Sackman, deceased, and Anna Jenner in behalf of herself, and as trustee of Charles E. Jenner, Anita Jenner and George K. Jenner.

A brief description of defendant's plant is contained in the opinion of this Commission upon Application No. 1868 (Decision No. 2789), Vol. 8, Opinions and Orders of the Railroad Commission of California, Page 170.

From the evidence introduced we find that under present conditions in order to give the inhabitants of the Town of Etna proper fire protection, sufficient water should at all normal times be retained in the supply ditch, so that the water overflowing at the wasteway near the penstock would be not less than two inches in depth by 52 inches in width, and we believe it would be practicable to install a gate in defendant's ditch at what is commonly known as Marble Gulch (some three-quarters of a mile above the penstock) in such a manner as to allow complainant the use of defendant's surplus water without reducing the flow in the ditch below the level suggested.

A more difficult point of determination, however, is how much water complainant can use in this manner without interfering with the rights of the interveners. Without endeavoring to determine just what these rights may be, it is sufficient for the purposes of this case to state that, while complainant's and defendant's uses date back approximately eight and twenty years respectively, the uncontradicted testimony of several of the interveners was to the effect that for the last fifty or sixty years practically all the water available from Etna Creek during

the drier periods of the irrigating seasons had been used by them or their predecessors in interest, some of this water having been used for the operation of a flour mill known as the Union Mill (formerly owned by Charles Jenner, deceased), and the rest for irrigation upon four or five farms now belonging to the respective interveners.

The mill is run by a water wheel requiring for its operation approximately nine cubic feet per second, the water passing through two $3\frac{1}{2}$ -inch nozzles with a head of approximately 53 feet. The water used in operating the mill is not available for the irrigation of any of the farms of the interveners, and, according to the testimony, the mill has to be either partially or entirely shut down during the period of greatest water shortage practically every season. In addition to the water used in the mill, the total amount of land irrigated by the interveners is, on the average, somewhere in the neighborhood of sixty to ninety acres.

The interveners have never made a definite segregation of their various water rights, it appearing from the evidence that each has used what he considered a fair amount, taking all he wanted during the early part of the season and reducing the amount he used as the supply grew less. The evidence further shows, however, that there has always been more water in Etna Creek than the defendant and all the interveners could use until about the 15th of July, and, accordingly, we feel that interveners' rights will not in any way be infringed if defendant is required to furnish complainant water up to

July 15th of each season, and later, when feasible, upon the terms and conditions set forth in the following order.

ORDER

Public hearings having been held in the above entitled case, at which evidence was introduced by both parties and by the interveners, and the matter having been duly submitted and being now ready for decision,

It is hereby ordered that defendant shall, within sixty days from the date hereof, install a gate or other device at Marble Gulch in such a manner that it will be able to deliver to complainant surplus water whenever there is more than enough water in the ditch to allow an overflow at the wasteway near the penstock of two inches in depth by 52 inches in width, and defendant shall thereafter deliver to complainant, at a rate of not more than ten cents (10¢) per miner's inch per twenty-four hours, such excess of water, over and above the reserve flowing through the wasteway as hereinbefore provided, as complainant may demand for the proper irrigation of his land above referred to, at all times excepting between July 15th and November 1st of each year.

IT IS HEREBY FURTHER ORDERED that between July 15th and November 1st defendant shall deliver, subject to the conditions and at the rate above set forth, such ~~water~~ surplus water, upon demand of the complainant, as may not be required for beneficial use by any of the interveners, in seasons when there is

more water available than defendant and interveners require.

Dated at San Francisco, California, March 8th,

1917.

Max Thelen

H. D. Leonard

W. G. ...

Edwin O. Edgerton

Frank R. ...

Commissioners.